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No. 99 402

In The

SUPREME COURT OF THE UNITED STATES

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS LOCAL 287; ED QUINTAL; ED DEBROCK; GEORGE NETTO; LEE SCOGGINS,

Petitioners,

vs.

BILL BROOKE; ROBERT SANDOVAL; ROBERT WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a union is prohibited by Title I of the Labor Management Reporting and Disclosure Act (29 U.S.C. §411 *et seq.*) from disciplining union officials who violate a valid union rule against using union funds for election campaigning where their violation occurs in the context of other conduct they engaged in that is protected by the Act.

2. Whether the evidentiary framework derived from this Court's decision in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) is properly applied to cases arising under Title I of the Labor Management Reporting and Disclosure Act (29 U.S.C. §411, *et seq.*) involving the discipline of union officials who engage in both protected and unprotected conduct within the meaning of the Act.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

All parties to the proceedings below are identified in the caption. Petitioner Freight, Construction, General Drivers, Warehousemen and Helpers, Local 287 is an unincorporated labor organization affiliated with the International Brotherhood of Teamsters, AFL-CIO.

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Petitioners Freight, Construction, General Drivers, Warehousemen & Helpers Local 287 and Ed Quintal, Ed DeBrock, George Netto and Lee Scoggins (hereafter collectively referred to as the "Union"), petition for the issuance of a Writ of Certiorari to review the decision and judgment of the Unites States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The Order and Amended Opinion of the Court of Appeals is reported at 175 F.3d 680, 161 L.R.R.M. 2065, (9th Cir. 1999) and is reproduced in Appendix A, *infra.* The District Court's unpublished Memorandum of Decision, denying Defendants' Motion for Judgment as a Matter of Law and granting Defendants' Motion for a New Trial is reproduced in Appendix B, *infra.*. The Decision and Order of the District Court granting in part and denying in part Plaintiffs' Motion for Summary Judgment, and denying Defendant's Cross-Motion for Summary Judgment is reported at 832 F. Supp. 283, (N.D.Cal. 1993) and reproduced in Appendix C, *infra.*

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its original Opinion on April 21, 1999 and its Amended Opinion on June 3, 1999. Petitioners filed a Petition

for Rehearing and Suggestion for Rehearing En Banc which the Court of Appeals denied on June 7, 1999 (App.D, 41a - 42a).[1] The Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254 (1) and 2106.

STATUTORY PROVISIONS

The relevant statutory provisions are Section 101(a)(2), Section 101(a)(4), Section 101(a)(5) and Section 401(g) of the Labor Management Reporting and Disclosure Act ("LMRDA" or the "Act") (29 U.S.C. §§411(a)(2), (4) and (5) and §481(g)). The pertinent text is reproduced in Appendix E, *infra.*

STATEMENT OF THE CASE

This case grows out of internal union disciplinary proceedings involving charges that the plaintiffs impermissibly used union funds to promote their own campaigns for election to union office in 1988.

The District Court had original jurisdiction in this cause pursuant to 28 U.S.C. §§1331 and 1337. The plaintiffs filed the present action in the district court under Sections 101(a)(2), (a)(4) and (a)(5) of the LMRDA, asserting that by

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[1] Citations to "App." are to the appendix to this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14.1.(i).

disciplining them the Union had retaliated against them for exercising their free speech rights, their rights to sue, and their rights to a fair hearing.

Before trial, the District Court granted summary judgment as to the liability issue on the due process count, leaving the question of dar ages on this claim for the jury to decide, but denied summary judgment on the remaining counts. The jury awarded substantial damages to the plaintiffs on all counts. However, the trial judge granted the defense motion for a new trial. In so doing the judge explained that:

> [the] great weight of the evidence favors Defendants' affirmative defense that...plaintiffs would have been disciplined in any event for violating a reasonable rule of the union even if Defendants disciplined them because of a retaliatory motivation" (App.B, at 27a-28a).

The second trial resulted in a verdict for the Union on the §§101(a)(2) and (a)(4) claims and an award of nominal damages to the plaintiffs in the amount of $1.00 against each defendant on he §101(a)(5) count. Plaintiffs appealed and the Court of Appeals reversed the trial judges's new trial order issued at the close of the first trial, reinstated the original verdict and remanded the case to the District Court for consideration of a possible remittitur with respect to some, but not all, of the components of the original damages award.

The salient facts for resolving the issues raised in this Petition are largely undisputed and may be summarized as follows:

A. The Structure and Governance of the Union

Teamsters Local 287 is a local labor organization affiliated with the International Brotherhood of Teamsters ("IBT"). The IBT is organized on a geographic basis into several intermediate bodies known as Joint Councils; these in turn are comprised of the various local unions within the designated geographic jurisdiction of the particular Council. The Union involved in this case is affiliated with Teamsters Joint Council No.7. The Union represents approximately 2800 members working in a variety of occupations and has its principal office in San Jose, California.

The affairs of the Union are governed by its Bylaws and the Constitution of the IBT. Pursuant to these governing documents an elected Executive Board, consisting of seven members, is charged with the overall responsibility of supervising the affairs of the Union between the regularly scheduled general membership meetings. The day-to-day management of the Union is the responsibility of the Secretary-Treasurer, who is the principal officer.

The Union's Executive Board is required by the Bylaws to convene at least on a weekly basis. The Executive Board must transact the business of the Union through the procedure of having motions made, discussed and then voted upon at meetings of the Board. Pursuant to Article XVII,

Section 3 of the Bylaws, a majority vote of the Board taken at its regularly scheduled meetings, where a quorum is present, is deemed to be the official action of the Union. On matters such as extraordinary expenditures of Union funds, requiring action of the Board between its regular meetings, the Bylaws provide for the polling of all members of the Board by "telegram, letter or telephone".

Under the Bylaws, and pursuant to the requirements of the LMRDA, the Union conducts elections of its officers every three years. The present case arises in the context of the 1988 union election. Prior to that election, plaintiffs Brooke, Sandoval, and Williams were members of the Executive Board. Another Board member, Bart Wolin, was politically aligned with the plaintiffs. These four were opponents of the principal officer at the time, Mario Gullo, and the other two members of the Board.

The December 1988 elections resulted in the defeat of Gullo by David Haas[2], but each of the individual defendants, all of whom were Gullo supporters, were elected to a majority of the positions on the new Executive Board. Sandoval was reelected as President of the Board, while Brooke and

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[2] Haas was a plaintiff in the original action, but has since died. The administrator of his estate, Sandy Snyder, was substituted in as a party but that portion of the case has long been settled and is not affected by these proceedings.

Williams won positions as Business Agents[3] but were unsuccessful in their bids for reelection to positions on the Executive Board.

B. The Expenditure Of Union Funds By The Plaintiffs During the Course Of Their Election Campaign.

According to the plaintiffs, during 1988 they became concerned with Secretary-Treasurer Gullo's handling of his financial responsibilities. In particular, they claim to have been disturbed by the apparent lack of adequate records reflecting the receipts and expenditures of "supplemental dues", paid by the Union's members employed in the construction industry in addition to the standard dues required of all members. In addition, plaintiffs were also concerned about Gullo's handling of the Union's Sick and Death Benefit Fund, set up to provide for benefits to members who become sick and to the family of a member who dies.

By September 1988 each of the plaintiffs had decided to run for reelection and began meeting with their supporters, including retired member Frank Martinez. He introduced them to a private attorney, Fernando Hernandez, with whom plaintiffs met at least twice in September 1988 to discuss their

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[3] Business Agents are responsible for the daily representation of the members in collective bargaining related matters but do not serve in a policy making position on the Executive Board.

concerns about Gullo. None of the other Executive Board members were apprised of these meetings.

However, at the meeting of the Board on October 6, 1988, the plaintiffs presented a motion for the Board's approval that the Union hire attorney Hernandez "...for the purpose of investigating the proper application in regards to the supplemental dues being paid by mixer and construction members, and other related matters, as prescribed by our bylaws." Plaintiffs, joined by their supporter Bart Wolin, commanded a majority of the Board and voted to adopt the motion. Immediately following that Board meeting, plaintiffs signed a retainer agreement with Hernandez committing the Union to pay him legal services at the rate of $200.00 an hour, with a non-refundable retainer of $5000.00.

The action of the Executive Board was reported to the membership at the October 15th general membership meeting. The membership adopted a motion directing the Board to rescind its action hiring Hernandez as attorney for the Union. The plaintiffs ignored the memberships' directive, and instead continued to employ his services, the cost of which ultimately exceeded $13,000.00.

During the 1988 election campaign season, at the direction of the plaintiffs, Hernandez performed a variety of services purportedly in the name of the Union -- all of which involved issues exploited by the plaintiffs in their campaigns. Hernandez did so with the understanding that his fees would be paid for exclusively out of the Union's funds. In particular, plaintiffs had him do the following legal work:

1. Immediately after the October 6th Board meeting was adjourned, plaintiffs met among themselves and decided to have Hernandez obtain a copy of an earlier confidential settlement agreement between the Union and the Equal Employment Opportunity Commission disposing of a race discrimination lawsuit brought on behalf of a former clerical employee of the Union, Syble Coleman. The plaintiffs themselves had voted as members of the Executive Board to approve that settlement at an earlier Board meeting and knew that its terms were to be confidential.

Despite the fact that no mention of this issue had been made to the Board at its October 6 meeting, and thus no motion had been brought to the Board to authorize the expenditure of funds for this purpose, the next day Sandoval telephoned Hernandez and instructed him to obtain the settlement document. The attorney contacted the Regional Office of the EEOC and, holding himself out as the Union's attorney, obtained a copy of the agreement. The copy was then passed on to the plaintiffs. Ignoring the mutual non-disclosure requirement, the financial terms of the settlement were thereafter publicized during the course of the election campaign. A recurring theme of the plaintiffs' campaign literature was the charge that Gullo had discriminated against Syble Coleman.

2. In November 1988, shortly before the December election, plaintiffs directed the attorney to file a lawsuit against Gullo. The suit alleged that Gullo had breached his fiduciary

duty by failing to provide an accounting, that he had embezzled Union funds, and that he was attempting to amend the Union bylaws without following proper procedures so as to provide for the appointment rather than the election of Union stewards. The suit named the Union as plaintiff and was soon amended to name as co-defendants other candidates who supported Gullo in the forthcoming election, but who were not in any way involved at the time with the administration of Union funds.

Sandoval admitted at trial that before a lawsuit may be filed on behalf of the Union "...that's a matter that the Executive Board would, under the bylaws, discuss as a body..." (RT.Vol.V, p.67)[4] Despite this requirement, the plaintiffs did not seek nor obtain the authorization of the full Executive Board either to file the original suit or to amend it to name additional defendants.(*Id.*,pp.64-66). Instead, they made the decision to file the lawsuit in secret and without informing any other member of the Executive Board.

The fact of the filing of the lawsuit against Gullo and the other candidates who were running with him was featured extensively in the plaintiffs' election campaigns. So too, the allegations of misconduct contained in the Complaint became the cornerstone of their campaign platform.

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[4] The citation "RT" refers to the reporter's trial transcript.

3. Plaintiffs also used Hernandez to intercede with an employer, Fleming Foods, concerning a problem the plaintiffs had in gaining access to that employer's facilities to campaign among the Union members working there. More specifically, the plaintiffs believed they were being denied equal access to the premises and that their campaign literature was being improperly removed from the employee bulletin boards in the facility. At their direction, the attorney contacted Fleming Foods both by telephone and by letter. In the correspondence sent on the plaintiffs' behalf, Hernandez protested the apparent denial of access and threatened to bring suit against the company.

4. Finally, the attorney met on several occasions with plaintiffs' supporters, as well as other candidates on their slate. After the election was completed Hernandez spent at least 3 ½ hours with Sandoval, Brooke and another candidate, Greg Guevara, to review the election results and related matters.

Hernandez testified that he had not been separately retained by any of the plaintiffs to provide individual representation in connection with any of the foregoing services but was instructed to bill the Union for all his fees and costs.

C. The Post-Election Proceedings Against the Plaintiffs.

1. The unsuccessful candidates in the 1988 elections from both slates filed protests to the election results. In accordance with the IBT Constitution such protests were

initially presented to Joint Council No. 7 for determination. After conducting a hearing, insofar as is relevant to the instant proceedings, the Joint Council ruled that the election for the positions which the plaintiffs won should be vacated and a new election conducted.

In its written decision directing a new election the Joint Council explained that the plaintiffs had "...improperly used their official positions with Local 287, and the funds or credit of Local 287 to support their campaign and the campaigns of other candidates they supported...", and that the expenditure of the Union's funds to hire Hernandez to file the lawsuit as well as to perform services in connection with the Syble Coleman and the Fleming Foods matters had not been authorized by the Executive Board.

The plaintiffs appealed the Joint Council's decision to vacate the election results to the IBT, which affirmed that decision. A complaint was then made to the United States Department of Labor, pursuant to its authority under Title IV of the LMRDA (29 U.S.C. §§ 481-483) to investigate complaints concerning the conduct of union elections. In declining to overturn the IBT's affirmance of the decision to rerun the election, the Department of Labor noted that the use of Union funds to pay for attorney Hernandez arguably "...constitute[d] a Section 401(g) violation."[5] In its Statement

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[5] Section 401(g) of the Act forbids the use of any Union funds to "promote the candidacy of any person in any election subject to the provisions of [the Act]."(App.E,at 44a).

of Reasons, the D.O.L. explained that "...the International's decision to affirm the [Joint Council's] decision to rerun the election was reasonable and consistent with the intent of the Act in that the investigation revealed that violations of the Act occurred during the December 12, 1988 election."[6] The rerun election was conducted by secret ballot in September 1989; this time the membership voted each of the plaintiffs out of office.

2. In addition to challenging the election, Gullo filed charges against the plaintiffs under the Union Bylaws. The charges accused the plaintiffs, *inter alia,* of exceeding their authority under the October 6 Executive Board motion by filing the lawsuit "...without Executive Board approval" and in other ways of "... the misuse of the powers of their office". In August 1989 the individual defendants, who by then constituted a majority of the newly elected Executive Board, convened a hearing on the charges. Although given notice of the hearing none of the plaintiffs appeared.

The hearing tribunal found each plaintiff guilty as charged. At the trial in the instant action defendant Quintal testified without contradiction that the tribunal reached its decision based on a combination of factors. In particular, he

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[6] The full text of the D.O.L.'s decision was not received into evidence in the first trial, but its content was referred to by witnesses from both sides during their testimony.

explained that evidence was presented establishing that the plaintiffs had used Hernandez to obtain the Syble Coleman settlement documents, to intercede on their behalf with Fleming Foods, and to file the lawsuit on behalf of the Union shortly before the election against Gullo and others, all of which the panel believed exceeded the scope of the October 6th motion authorizing the employment of Hernandez. (RT. Vol.X, pp.78-80).

Plaintiffs appealed the discipline to the Joint Council largely on procedural grounds but did not contest the essential facts upon which the Union had rested its decision. The Joint Council affirmed the discipline. In the interim, this action was instituted in the District Court.

D. The Proceedings Below

1. Prior to trial the parties submitted cross-motions for summary judgment. The District Court ruled in favor of the plaintiffs on the §101(a)(5) due process claim, holding that the composition of the Union's hearing panel was biased as a matter of law because its members were political opponents of the plaintiffs. Thus, the only issue left for trial on this count was the question of damages for the due process violation.

The District Court denied plaintiffs summary judgment on the right to sue claim because it found there were disputed material facts. The Court explained its decision as follows:

> It has not yet been determined whether or not the plaintiffs were disciplined because they initiated the lawsuit or because they went beyond the boundaries of the Executive Board's resolution in investigating Gullo. If the discipline stemmed from misuse of the attorney's time, it would not be related to individual rights but proper union management and use of union finances. (App.C, at 39a).

The District Court thus recognized the important distinction between the disciplining of union officials solely because they filed a lawsuit against another official on the one hand, and on the other hand disciplining the officials for the misuse of union funds to promote their personal election campaigns, even if one device for doing so was the filing of a lawsuit, where such expenditure has not been duly authorized. In this posture the case proceeded to trial.

2. Upon the conclusion of the presentation of the evidence, the trial judge instructed the jury, without objection from either side, that to establish a violation of §§101 (a)(2) and (a)(4) the plaintiffs had to prove by a preponderance of the evidence that: "... the defendants' decision to discipline plaintiff was made in significant part because of his exercise of these protected rights".(App.F, at 45a). The judge then instructed the jury as to the defendants' affirmative defense in the following terms:

> If you find that plaintiffs have established each of the elements necessary to make out a prima facie case of retaliation for their exercise of legally protected rights, then defendants may rebut that inference by proving by a preponderance of the evidence that the plaintiffs would have been disciplined for violating a reasonable rule of the Union even if defendants had not been motivated by an improper purpose. And that's for the defense to prove. Therefore, if you find by a preponderance of the evidence that there was reasonable standard for the discipline of plaintiffs under the circumstances of this case, your verdict must be for the defendants... (App.F,at 45a-46a).

The jury returned a verdict in the plaintiffs' favor on all counts and awarded them damages totaling in excess of $1.3 million. Pursuant to Rules 50(b) and 59(a) defendants moved for judgment as a matter of law or in the alternative for a new trial. The trial judge granted the motion for a new trial and vacated the jury verdict in its entirety as to the plaintiffs herein. The judge concluded that the "great weight" of the evidence supported the affirmative defense set forth in the jury instruction. The second trial produced a defense verdict on the §§ 101(a)(2) and (a)(4) counts. Plaintiffs appealed from the judgment in the second trial and from the Order granting a new trial following the verdict in the first trial.

3. The Court of Appeals reversed the trial judge's new trial order. In an opinion authored by Judge Reinhardt, the Court of Appeals described the issue in this case as simply whether "...the plaintiffs had legitimate grounds to cause the hiring of Hernandez and the institution of the action" (App.A, at 16a). The Court further reasoned that only if "the plaintiffs had no legitimate basis for their actions, the discipline imposed upon them may have been lawful." (*id.*).

From this premise, the Court proceeded to analyze the record to determine whether the jury could have concluded that there was a reasonable basis for the plaintiffs to be concerned over Gullo's handling of the Union's Sick and Death Benefit Fund and the Supplemental Dues program. The Court concluded they had "valid cause to believe that Gullo was mishandling union funds." (*Id.* at 18a). According to the Court, this conclusion was dispositive of the case, irrespective of whether plaintiffs had also engaged in conduct that was unprotected by Section 101(a) of the LMRDA for which they could have been lawfully disciplined.

The Court expressly disapproved the jury instruction that permitted defendants to prove, as an affirmative defense, that plaintiffs were subject to discipline for violating a reasonable rule of the Union, even if they were disciplined in part for protected conduct; an instruction the Court believed would only be appropriate in a case involving "mixed-motives" but inapplicable in the present setting.

The Court also declined to scrutinize the discrete components of the services performed by Hernandez for the plaintiffs to determine whether each was properly authorized by the Union or otherwise protected by the LMRDA. In a brief but revealing footnote, the Court dismissed the necessity for such an inquiry:

> That Hernandez performed several other tasks at the Board's request, such as procuring a copy of the Syble Coleman racial-discrimination settlement and informing Fleming Foods about the requirements of federal labor law, in no way alters our analysis. (App.A, at 15a, n.8).

Instead of remanding the case for a new trial on the theory of liability which the Court of Appeals determined was the correct one, it reinstated the original verdict. The opinion explains that under the jury instruction actually given, the jury necessarily found that "...the hiring of Hernandez and the institution of the action were undertaken in the interests of the union and not 'in support of the [plaintiffs'] candidacy' for union office." (*Id.* at 21a).

REASONS FOR GRANTING THE WRIT

As explained by this Court in *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), the scope of the protection afforded union members by Section 101(a)(2) of the LMRDA and the scope of a union's authority to enforce its rules concerning the obligations of members to their unions are to be measured by taking into account the competing policy considerations those provisions embody. The demarcation line to be drawn is determined by balancing these equally important considerations. It is scarcely surprising, as is the case here, that the activities of members who oppose a union's incumbent administration may be an admixture of both protected activity and activity that may properly be subject to union discipline. (See also the decisions in this area of the law cited *infra.*, at pages 27-28). Although the factual determinations that courts make in these cases may not be of sufficient importance for review by this Court, the analytical framework within which such decisions are reached presents a substantial and important question in the administration of the LMRDA. The present Petition presents this question.

The Court of Appeals in this case has adopted an approach that shields a union member who engages in a combination of protected and unprotected conduct from any discipline for that part of the conduct that clearly violates a reasonable union rule within the meaning of the proviso to §101(a)(2). As we show below, the problem addressed by the Ninth Circuit's opinion is recurring, and one with respect to

which there is inconsistency and conflict among the courts of appeals.

In short, the Petition presents a question of substantial importance, and one in which uniformity of decision among the lower courts does not presently exist. It should be addressed therefore by this Court.

I.

THE PETITION SHOULD BE GRANTED IN ORDER TO AFFIRM THAT THE TWO-PART TEST SET FORTH IN *MT.HEALTHY* IS PROPERLY APPLIED TO LMRDA TITLE I CASES.

a. Initially, it is important to point out that the undisputed facts in this case squarely present the issue discussed above. Thus, as summarized in the Statement of the Case, the plaintiffs committed Union funds for both permissible and impermissible purposes.

The Union Bylaws set forth in detail the proper allocation of authority and responsibility among the seven-member Executive Board. An important check on the powers of the individual officers is the express requirement, specified in Article XVII, Sections 3 and 5, that the business of the Union, including authorization of expenditure of Union funds, is to be transacted only at the regularly scheduled weekly meetings of the Board or, if necessary between Board meetings, by polling all members. In addition, Article XVII, Section 1.a. of the Bylaws further limits the Board's authority

to transacting the Union's business "...between membership meetings...". Thus, the Union Bylaws prohibit any particular faction of the Board, whether comprising a majority or not, from using the funds of the Union or from undertaking any other action on behalf of the Union without first obtaining proper authorization from the Board through the above procedures; irrespective of whether the proposed action would be completely justified.

With respect to the plaintiffs' initial hiring of Hernandez to investigate "supplemental dues" and "related matters", we can agree that they obtained proper authorization by the approval of the enabling motion presented to the Executive Board at its October 6 meeting. Accordingly, the expenditure of funds for that limited purpose was permissible. But thereafter the undisputed facts establish that there was no authorization for plaintiffs to use Union funds for any other purpose; indeed at the subsequent general membership meeting the Executive Board was directed by the membership to rescind the October 6 motion. The plaintiffs blithely ignored this directive of the membership and continued to use the Union's funds to pay for Hernandez' services. Thus, plaintiffs were not authorized to obtain the confidential settlement agreement in the Syble Coleman matter, nor to have Hernandez intercede in their behalf concerning campaign access with Fleming Foods. As to the filing of the lawsuit against Gullo, it is not necessary to disagree with the Ninth Circuit's conclusion that there was good cause for the plaintiffs to sue him, but the critical point is that they used

Union funds for this purpose without seeking or obtaining proper authorization as required by the governing Bylaws[7].

From the foregoing discussion, it is plain enough that the plaintiffs used Union funds without authorization for a variety of services performed by Hernandez to promote their election campaigns. By so doing, and as found by the Union hearing panel (*supra.*, at p.13), they violated the Union's reasonable rules. Certainly, there was ample evidence presented at trial to warrant the District Court's acceptance of the parties' characterization of this case as involving both protected and unprotected grounds for the discipline.

But, by framing the issue simply as whether "...the plaintiffs had legitimate grounds to cause the hiring of Hernandez and the institution of the action..." against Gullo (App.A, at 16a), the Ninth Circuit erroneously glosses over these critical facts. Consequently, the Court of Appeals does not consider whether the unprotected aspects of the plaintiffs' conduct, standing alone, properly subjected them to discipline under the Union's rules. In fact, the Court expressly declines to do so. (*Id.*, at 15a, n.8). By failing to distinguish

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[7] It is worth noting, insofar as the §101(a)(4) count is concerned, that unlike the ordinary "right to sue" case, here the Union did not discipline the plaintiffs simply because, in their capacity as members, they brought suit against the Union's principal officer using their own funds--- conduct we concede would have been protected by that provision--- but because they caused Union funds to be used for that purpose without proper authorization.

between the different elements of the plaintiffs' conduct, as we show next, the Court below departs from the principles set forth in this Court's opinion in *Sadlowski* and in other prior decisions issued in conceptually similar settings.

b. As pointed out by this Court, LMRDA §§ 101(a)(2) and (a)(4) protect the rights of union members to speak freely and to sue. These rights, however, are not absolute. The proviso to §101(a)(2) expressly reserves to unions the right to "... adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 29 U.S.C. §411(a)(2). In *Sadlowski*, this Court was called upon to review under this provision a union rule which forbad candidates for union office from using funds contributed to their campaigns by nonmembers. The Court determined that such a restriction on outsider contributions in union elections was rational and thus within the proviso to §101(a)(2), even though it impinged upon the candidates' free speech rights.

In reaching that conclusion, the Court specified the proper analytical framework to determine whether §101(a)(2) has been violated. First, it must be determined whether the rule interferes with an interest protected by the first part of §101(a)(2). If it does, then the second part of the analysis is to determine ".. whether the rule is 'reasonable' and thus sheltered by the proviso..."(*ibid.*). The Court explained that:

> [t]he critical question is whether a rule that partially interferes with a protected interest is nevertheless reasonably related to the protection of the organization as an institution." (*Id.* at 111-112).

The principles derived from *Sadlowski* surely apply with equal force to cases, such as the present, concerning the validity of a union's enforcement of its reasonable rules as well as the determination in the first instance as to whether the union's adoption of the rule is within its authority under the proviso to §101(a)(2).[8]

It is clear from this Court's reasoning in *Sadlowski* that merely because the trier-of-fact concludes that the enforcement of a particular union rule interferes to some extent with rights protected by Title I, that cannot be the end of the inquiry. Rather, the analysis must then shift to a

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[8] The Union's rule, expressly incorporating the prohibitions against the expenditure of union funds for campaign purposes contained in §401(g), (29 U.S.C.§481(g)), was specifically announced to all candidates before the 1988 election. In addition, the Bylaws contain several provisions that either expressly or by necessary implication forbid the expenditure of union funds to further personal political aspirations. Indeed, it was conceded by the plaintiffs at trial that a violation of these rules was considered a serious offense, subjecting the violator to discipline. (R.T.Vol.IV, p.225).

determination of whether the enforcement of the particular rule serves a legitimate interest of the union and is thus sheltered by the proviso. Put another way, if the particular rule is reasonable within the meaning of the proviso, then conduct which is violative of the rule is unprotected and may be made the subject of union discipline.

c. In several other prior decisions, arising in similar contexts as here, the Court has considered what form of analysis should be used by the courts where the conduct at issue involves activity that is in part protected and in part unprotected. These precedents strongly support the jury instruction that the District Court gave in the case at bar.

In *Mt.Healthy City School Dist.Bd. of Educ., v. Doyle,* 429 U.S. 274 (1977), a case where the plaintiff's activities were subject to the more stringent protections afforded by the First Amendment, this Court held that because plaintiff also engaged in conduct that was not constitutionally protected the employer should have had the opportunity to prove, by a preponderance of the evidence, that apart from the protected aspects of his activity there was a permissible basis for its decision not to rehire him.

To aid the trier-of-fact in balancing the competing considerations involved in such cases, the *Mt. Healthy* Court adopted a burden shifting approach, under which the plaintiff first has to establish that protected conduct is a "substantial factor" in the decision. If this is proven, then the trier-of-fact must then determine whether the adverse decision would have

been reached in any event because of the plaintiff's unprotected conduct. (*Id.*,at 429 U.S. 287). The Court explained the rationale underlying this framework as follows:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. (*Id.*at 429 U.S. 285).

The *Mt Healthy* formulation was applied in *Price Waterhouse v. Hopkins*, 490 U.S. 228, (1989) to a similar setting under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. §§ 2000e *et seq.*).

Likewise, in *NLRB v. Transportation Management Corp*. 462 U.S. 393 (1983) the Court approved the application of the same evidentiary regime in the context of the discharge of a worker in part because of his union activities, protected by the unfair labor practice provisions of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq*.. In so doing, the Court upheld the NLRB's approach -- expressly borrowed from *Mt Healthy* -- which allows the employer to avoid liability "... by proving that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event." *Transportation Management, supra*., at 462 U.S. 400.

The common thread that runs through the foregoing decisions is the recognition by this Court, in a variety of settings analogous to the present context, that a plaintiff who engages in activity containing both protected and unprotected elements, and shows the protected conduct played a substantial part in the adverse decision, is not automatically immune from adverse consequences for that part of the conduct which is not protected. There is no principled reason not to apply the same mode of analysis to union discipline cases arising under the LMRDA which similarly involve both protected and unprotected conduct on the part of the disciplined member.

II.
THE NINTH CIRCUIT'S DECISION ADDS TO THE CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE PROPER STANDARD FOR DETERMINING WHETHER UNION DISCIPLINE IS VALID UNDER LMRDA TITLE I.

In the present case, the jury instruction was expressly fashioned to specify the test for liability outlined in *Mt.Healthy* and *Black v. Ryder/P.I.E. Nationwide*, 970 F.2d 1199 (6th Cir. 1979) , a case in which the Sixth Circuit expressly analogized the problem presented in the LMRDA context to that confronted by this Court in *Mt Healthy*.

In *Black* , as here, the plaintiff asserted that he had been disciplined by the union for his political opposition to the incumbent union leadership and in particular for organizing a picket line outside the union offices, activity protected by Title I. The defendant union argued that he had been disciplined for the violent and disruptive conduct which occurred on the picket line, conduct unprotected by the Act. On appeal from a verdict against the union, the Sixth Circuit found that the jury had been correctly instructed.

The Sixth Circuit thus expressly approved a two part test for evaluating Title I claims in all material respects identical to the approach adopted by the District Court in this case. According to the standard approved by the Sixth Circuit, once the plaintiff in a Title I case has "...proven that his exercise of protected speech played a substantial role in the actions taken against him, the burden then shift[s] to the

defendants to prove that their actions were a result of the adoption and enforcement of reasonable rules regarding the responsibilities of every member toward the union."(*ibid).* Accord, *Kuebbler v. Cleveland Lithographers & Photoengravers Union Local 24-P,* 473 F.2d 359 (6th Cir. 1973); see also, *Aircraft Mechanics v. Transport Workers Union of America* , 98 F.3d. 597 (10th Cir. 1996), (applying a two-step analysis to the discipline of union members who advocate dual unionism, and holding that such discipline is permissible under the proviso to §101(a)(2), even though it also involves elements of free speech).

By reversing the District Court's determination that the test applied in *Black v. Ryder* was applicable to the facts in the present case, the Ninth Circuit parts company with the Sixth and Tenth Circuits, as well as its own prior decisions. See e.g., *Fergusson v. Ironworkers*, 854 F.2d 1169 (9th Cir. 1988) and *Massey v. Inland Boatmen's Union*, 886 Fd 1188 (9th Cir.1989).[9] Indeed, the Court seems to suggest that the

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[9] In *Fergusson*, a case not discussed in the decision below, a different panel of the Ninth Circuit did apply a balancing test to determine whether the union there properly disciplined its member. The *Fergusson* court held, contrary to the Ninth Circuit in the instant case, that a member is not immune from discipline simply because the particular conduct may be in part protected, supra., at 854 F.2d 1174. In *Massey* another panel of the Ninth Circuit expressly adopted a burden shifting regime, identical to the *Mt. Healthy* formulation, to determine violations of Title I.

plaintiffs were entitled to a verdict in their favor " if they had *a* legitimate basis for their actions..." (App.A, at 21a; emphasis supplied). The Court has now aligned itself with those Circuits which have held that it is enough for a Title I plaintiff to prove that protected speech was one of the reasons for the discipline, even if the union can prove that there was an independent basis for discipline. See, *Petramale v. Laborers Local 17,* 736 F.2d 13 (2nd. Cir. 1984) cert., denied, 469 U.S. 1087 (1984); *Bradford v. Textile Workers Local 1093,* 563 F.2d 1138, 1143, (4th Cir.1977).

In disapproving the jury instruction, the Court of Appeals explained that the affirmative defense, borrowed from *Mt. Healthy* and *Black v. Ryder,* is not available to the Union here because: "[t]his case does not present a dispute as to what motivated the defendants to discipline the plaintiffs."

It is not necessary to disagree with the Ninth Circuit's view that this case does not involve the "mixed-motives"of the defendants.[10] However that may be, the decisive point is that it certainly presents an admixture of conduct, a part of which is protected by the first clause of §101(a)(2), and a part which plainly violated the Union's rule against the unauthorized use of union funds for campaign purposes, a rule

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[10]Nonetheless it is worth pointing out that from the inception of this case the plaintiffs considered this a "dual motives" case. It is therefore not surprising that the District Court adopted that terminology as well.

easily supportable under the proviso.

In this circumstance, the District Court properly looked to *Mt. Healthy* for an analytical framework that conveys the principle embodied in Title I that a union member ought not to escape the disciplinary consequences of violating the union's reasonable rules, simply because that violation occurs in the context of other activity that may be protected. The contrary holding of the Ninth Circuit in the present case, and the approach of the Second and Fourth Circuits in similar cases, is fundamentally at odds with this Court's prior rulings and is incompatible with the strong command of the proviso to §101(a)(2) that nothing is to impair the union's right to enforce its reasonable rules.

CONCLUSION

For all the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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